

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

KELLY FOODS OF ALABAMA,)	
INC.,)	
)	
Plaintiff,)	
)	CIVIL ACTION NO.
v.)	1:04cv1246-MHT
)	
MYERS NISSI & COMPANY,)	
INC., etc.,)	
)	
Defendant.)	

ORDER ON PRETRIAL HEARING

A pretrial hearing was held in this case on August 4, 2006, wherein the following proceedings were held and actions taken:

1. PARTIES AND TRIAL COUNSEL:

Kelley Foods of Alabama, Inc. -- Mark Vaughan, Esq.;
Howard P. Walthall, Jr., Esq.; Ellen Gober, Esq.
Myers Nissi & Company, Inc. d/b/a VerticalSoft --
John Michael Herke, Esq.; Paul Palermo, Esq.

COUNSEL APPEARING AT PRETRIAL HEARING: Same as trial counsel, except that Mr. Palermo and Ms. Gober did not attend.

2. JURISDICTION AND VENUE:

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332. Venue is proper pursuant to 28 U.S.C. § 1441, *et seq.*

3. PLEADINGS:

The following pleadings and amendments were allowed:

- a. Complaint by Kelley Foods of Alabama, Inc.
- b. Answer by Myers Nissi & Company, Inc.

4. CONTENTIONS OF THE PARTIES:

(1) The Plaintiff(s):

Defendant breached a contract between the parties to develop, install, and implement computer software to be used in the Plaintiffs' operations, and to provide training and technical assistance in connection with such software. Defendant also breached express and implied warranties relating to the software. Plaintiff contends

that Defendant's services and software failed to perform as represented.

(2) The Defendant(s):

Defendant complied with its obligations under the contract between the parties to develop, install, and implement computer software to be used in the Plaintiffs' operations, and to provide training and technical assistance in connection with such software. Defendant contends that any failure of the project agreed to between the parties was a result of lack of cooperation and/or lack of sufficient commitment of time and resources to the project by the Plaintiffs. Defendant denies that it breached any express warranties. Defendant further denies that it made any implied warranties relating to the contract or the software and contends that any warranties implied by law were properly and expressly excluded by the language of the contract. Defendant further contends that, to the extent Defendant was allowed to engage in activities pursuant to the

contract, its services and software met all expectations and performed as represented.

5. STIPULATIONS BY AND BETWEEN THE PARTIES:

The parties have not agreed to any stipulations at this time.

It is ORDERED that:

(1) The jury selection and trial of this cause, which is to last three (3) days, are set for September 11, 2006, at 10:00 a.m., at the federal courthouse in Dothan, Alabama;

(2) The parties are to file their pre-trial briefs, proposed jury selection questions, and proposed jury instructions by September 6, 2006;

(3) Each party shall have available at the time of trial, for use by the court (the judge, the courtroom deputy clerk, and the law clerk), three copies of the list of his or her exhibits;

(4) At least three days before trial, counsel are to contact the courtroom deputy clerk about the procedures for pre-marking all trial exhibits;

(5) Each party shall have available a sufficient number of copies of each photostatically reproducible exhibit for each of the jurors, opposing counsel, the courtroom deputy clerk, the law clerk, and the judge; and

(6) All understandings, agreements, and stipulations contained in this pretrial order shall be binding on all parties unless an objection is noted and filed with the court within seven (7) days from the date of this order.

DONE, this the 8th day of August, 2006.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE